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No. 96- ORIGINAL

In the Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

96-6867

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IMMINENT EXECUTION SCHEDULED FOR DECEMBER 18, 1996

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November 26, 1996

CAPITAL CASE

QUESTIONS PRESENTED

1. Did this Court's decision in *Simmons* v. *South Carolina*, 114 S. Ct. 2187 (1994)—which recognized that when a prosecutor seeks to establish future dangerousness before a capital sentencing jury, due process entitles the defendant to rebut by presenting information regarding his parole ineligibility—constitute a "new rule" within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989), which cannot be retroactively applied to prior state-court convictions?

2. Does this Court's decision in *Simmons* fall within the second exception to *Teague*, which allows for the retroactive application of procedural rules that protect the fundamental fairness and accuracy of criminal proceedings?

3. Does DNA evidence that undermines the sole credible evidence supporting a capital conviction establish a claim of actual innocence under *Schlup* v. *Delo*, 115 S. Ct. 851 (1995)?

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PETITION FOR A WRIT OF CERTIORARI

Joseph Roger O'Dell, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are reported at 95 F.3d 1214 and 1255. (App. 1a and 83a.) There is no panel decision of the court of appeals. The opinion of the district court granting O'Dell's habeas petition in part and denying it in part is not officially reported. (App. 99a.)

JURISDICTION

On September 10, 1996, the court of appeals entered judgment reversing the district court's order to the extent it granted habeas relief and affirming it to the extent it denied habeas relief. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, it involves the Code of Virginia § 53.1-151(B1). The text of these provisions is set forth at pages 181a - 186a of the Appendix.

STATEMENT OF THE CASE

A. The Decision of the Court of Appeals

On September 10, 1996, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, by a vote of 7-6, entered judgment reversing the district court's order to the extent it granted habeas relief to O'Dell and invalidated his death sentence, and affirming it to the extent it denied habeas relief on O'Dell's conviction. 95 F.3d 1214. (App. 1a.) The majority opinion was authored by Judge Luttig and joined by Chief Judge Wilkinson and Judges Russell, Widener, Wilkins, Niemeyer and Williams. The minority opinion, dissenting in part and concurring in part, was authored by former Chief Judge Ervin and joined by Judges Hall, Murnaghan, Hamilton, Michael and Motz.

The court of appeals' *en banc* consideration, on its own motion, was not the first time that this case attracted unusual judicial attention. In 1991, concurring in a denial of certiorari after the completion of O'Dell's state habeas proceedings, Justice Blackmun, writing for himself, Justice Stevens and Justice O'Connor, stated that "the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself." *O'Dell* v. *Thompson*, 502 U.S. 995, 995 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor). The three Justices went on "to underscore the importance of affording petitioner meaningful federal habeas review" of, among other things, the claims presented in this Petition. *Id.* at 995-96 & n.3. (App. 177a-178a.)

The issue that divided the *en banc* court of appeals was whether this Court's decision in *Simmons* v. *South Carolina*, 114 S. Ct. 2187 (1994)—holding that when a prosecutor raises the issue of future dangerousness before a

capital sentencing jury, due process entitles the defendant to rebut by presenting information regarding his parole ineligibility—announced a "new rule" within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989). 95 F.3d at 1220-38. (App. 8a-45a.) The seven-member majority held that *Simmons* announced a new rule, while the six dissenters disagreed.

The court of appeals manifested a profound division about how *Teague* should be applied: the majority found that *Simmons* was "the paradigmatic 'new rule,'" while the dissenters were equally "persuaded that *Simmons* did not announce a 'new rule.'" 95 F.3d at 1218, 1256. (App. 3a, 83a.) Further demonstrating that the majority's understanding of *Teague* was fundamentally different from that of their colleagues, the majority expressly overruled two recent Fourth Circuit panel decisions, *Turner* v. *Williams*, 35 F.3d 872 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1359 (1995), and *Ostrander* v. *Green*, 46 F.3d 347 (4th Cir. 1995), which, in the majority's view, would have permitted an "inestimable number of cases" to escape the *Teague* bar. 95 F.3d at 1222. (App. 11a.)

In addition, the majority held that the *Simmons* rule did not fall within the second exception to *Teague*, which allows for the retroactive application of procedural rules affecting the fundamental fairness and accuracy of criminal proceedings. 95 F.3d at 1239. (App. 45a-46a.) The dissenters did not reach this question, but stated that a "strong argument" could be made that the *Simmons* rule does fall within *Teague*'s second exception. 95 F.3d at 1261 n.11. (App. 95a.)[1/]

[1/] Both the majority and the dissenters expressly declined to reach whether the Antiterrorism and Effective Death Penalty Act of 1996, which (continued...)

The court of appeals also considered O'Dell's claim that DNA blood testing performed after his trial demonstrated that he is actually innocent of the crime, thereby permitting habeas review of other claims that would otherwise be procedurally barred. The district court determined that O'Dell's claim of innocence met the standard of *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986), *i.e.*, O'Dell had shown "a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt." *Id.* at 454 n.17. However, the district court deemed itself bound to apply the more stringent standard of *Sawyer* v. *Whitley*, 505 U.S. 333 (1992). While the case was on appeal, this Court issued its decision in *Schlup* v. *Delo*, 115 S. Ct. 851 (1995), which propounded a new test. The court of appeals applied the new *Schlup* standard to O'Dell's DNA evidence of innocence, and held that it was not met. 95 F.3d at 1246-55. (App. 62a-82a.)

Accordingly, the court of appeals entered judgment reversing the district court's order to the extent it invalidated O'Dell's death sentence and affirming it to the extent it denied habeas relief on O'Dell's conviction. 95 F.3d at 1255. (App. 82a-83a.)

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[1] (...continued)
was enacted while this case was pending on appeal, applies to this case. 95 F.3d at 1255 n.36, 1256 n.1. (App. 82a, 83a.) The circuit courts are currently split on this question. *Compare Lindh* v. *Murphy*, 96 F.3d 856, 867 (7th Cir. 1996) (*en banc*), *pet. for cert. pending*, No. 96-6298, and *Drinkard* v. *Johnson*, 97 F.3d 751, 766 (5th Cir. 1996) (holding statute applicable to cases pending on appeal), *with Huynh* v. *King*, 95 F.3d 1052, 1055 n.2 (11th Cir. 1996), *Boria* v. *Keane*, 90 F.3d 36, 38 (2d Cir. 1996), *pet. for cert. pending*, No. 96-628, and *Edens* v. *Hannigan*, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996) (holding statute inapplicable to cases pending on appeal).

On October 8, 1996, the court of appeals granted a 30-day stay of the mandate to permit the filing of a petition for certiorari. (App. 171a.) Notwithstanding the stay, however, on October 24, 1996, the Virginia state court set an execution date for O'Dell. (App. 173a.) O'Dell is currently scheduled to be executed on December 18, 1996.[2]

B. Factual and Procedural Background[3]

O'Dell was convicted of capital murder in the death of Helen Schartner on February 6, 1985. There were no eyewitnesses to the crime. The case against O'Dell rested largely on the conclusion of a state laboratory technician, arrived at without the benefit of DNA testing (which was not then available), that blood on O'Dell's clothing was "consistent" with Schartner's blood. As explained more fully below, *see* pp. 23-29, *infra*, subsequent DNA evidence contradicted the blood evidence offered at trial. It is highly unlikely that any jury would have convicted O'Dell had it known what the DNA evidence shows.

The penalty phase of O'Dell's trial was indistinguishable from the penalty phase in *Simmons*. The substance of the prosecution's case for a death sentence was that mere imprisonment was ineffectual to curb O'Dell's criminal behavior and nothing short of death would keep O'Dell out of circulation. The prosecution highlighted O'Dell's past parole releases, and gave the false impression that O'Dell might be

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[2] On November 19, 1996, O'Dell applied to the court of appeals for a stay of execution. The court of appeals has not yet ruled on the application.

[3] Citations to "J.A. ___" refer to the Joint Appendix submitted to the court of appeals below.

similarly paroled if sentenced to life imprisonment for Schartner's murder.[4/]

In truth—as the jury never learned—under Virginia law, O'Dell would have been absolutely ineligible for parole had he been sentenced to life imprisonment. Va. Code Ann. § 53.1-151(B1). (App. 182a.) O'Dell requested that the court so instruct the jury. (J.A. 2308, 2378-79) This request was denied. (J.A. 2386.) O'Dell also sought to testify in direct examination as to his parole ineligibility. (J.A. 2431) This testimony was excluded. (*Id.*) It is beyond dispute—and neither the Commonwealth nor the majority below did dispute—that this ruling was contrary to this Court's holding in *Simmons* that a capital defendant has a due process right to rebut a claim of future dangerousness by presenting evidence of his parole ineligibility. Thus, if *Simmons* is applied to his case, O'Dell's death sentence cannot stand.

The jury fixed O'Dell's sentence at death, specifically finding that there was "a probability that the defendant would commit acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2-264.2(l). O'Dell's direct appeal to the Virginia Supreme Court was unsuccessful, 234 Va. 672, 364 S.E.2d 491, and his conviction became final on October 3, 1988—prior to this Court's

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[4/] The prosecution cross-examined O'Dell in exacting detail about his previous releases and pointed out that O'Dell served only seven months of a 1961 sentence, had served only 13 months of his next sentence, and was on parole at the time of Schartner's murder. (J.A. 2240-41) The Commonwealth again raised the specter of O'Dell's being paroled in its closing argument, in which it alluded to Florida's mistake in paroling O'Dell in 1982. (J.A. 2500) The Commonwealth also argued that "all the time he has committed crimes before and been before juries and judges, no sentence ever meted out to this man has stopped him and nothing ever will except the punishment that I now ask to impose." (J.A. 2502)

decision in *Simmons*, but subsequent to the two decisions on which *Simmons* primarily relied, *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Skipper* v. *South Carolina*, 476 U.S. 1 (1986).

Following an unsuccessful state court habeas proceeding (J.A. 278-79), O'Dell brought the federal habeas proceeding that is the subject of this Petition.

Argument

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* ANNOUNCED A NEW RULE FOR PURPOSES OF *TEAGUE*

A. The Question is a Substantial and Important One

The unusual importance of the first question presented in this case—whether the rule of *Simmons* is "new" for purposes of *Teague*—is evident from the proceedings in the court of appeals. On its own motion, the court of appeals selected this case for *en banc* consideration and rendered a 76-page slip opinion, with a 14-page dissent. The history of this case also shows that there is serious reason to doubt the correctness of the court of appeals' conclusion. The case was decided by the narrowest possible majority—7 to 6. The 14 judges—including the district judge—who have considered this issue in this case have divided equally on whether the rule of *Simmons* is "new." The Commonwealth can hardly argue that the question on which the court of appeals spent so much energy and divided so narrowly is not substantial or important.

Decisions of federal courts in other circuits reinforce the conclusion that the issue presented here calls for this Court's review. District courts in the Third and Seventh Circuits have considered the same issue, and have held that *Simmons* did not announce a "new rule." Their decisions are in direct conflict with the court of appeals' decision here. *Carpenter* v. *Vaughn*, 888 F. Supp. 658, 665-66 (M.D. Pa. 1995); *Spreitzer* v. *Peters*, 1996 WL 48585, at *5-*6 (N.D. Ill. Feb. 5, 1996). In addition, the Court of Appeals for the Seventh Circuit has indicated, in dictum, that it too would favor a result contrary to that of the Fourth Circuit here. *Stewart* v. *Lane*, 60 F.3d 296, 302 n.4 (7th Cir. 1995) (stating that, for purposes of *Teague*, "it is arguable that *Skipper* compels the result in *Simmons*"), *supplemented*, 70 F.3d 955, *cert. denied*, 116 S. Ct. 2580 (1996).

It is evident, we submit, that the question of whether *Simmons* announced a new rule deserves the attention of this Court. The proper time for giving that attention is now, to furnish a precedent for the numerous cases in which the issue is likely to recur.[3]

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[3] Counsel is aware of at least two pending cases in Virginia alone that raise the same issue presented here.

The Court's recent grant of certiorari in *Lambrix* v. *Singletary*, No. 96-5658, confirms that this case is worthy of the Court's review. *Lambrix*, like this case, raises the issue of whether a recent decision of this Court announced a "new rule" under *Teague*. The issue in *Lambrix*, as in this case, divided an *en banc* court of appeals. *Lambrix* v. *Singletary*, 72 F.3d 100 (11th Cir. 1996) (relying on *Glock* v. *Singletary*, 65 F.3d 878 (11th Cir. 1995) (*en banc*)). *Lambrix* concerns the retroactivity of this Court's holding in *Espinosa* v. *Florida*, 505 U.S. 1079 (1992), regarding the role of one of the aggravating factors in Florida's "trifurcated" sentencing scheme; in *Glock*, the Eleventh Circuit held, 7-3, that *Espinosa* announced a "new rule." This Court's decision in *Simmons* is at least as significant (continued...)

B. The Court of Appeals' Decision Takes an Extreme Approach to *Teague* That Is in Conflict With Decisions of This Court

The majority's holding in this case, we respectfully submit, marks a radical departure from the approach to *Teague* questions established by prior decisions of this Court. The extreme nature of the majority's approach is reflected in its overruling of prior circuit precedents; its stated belief that a reasonable jurist would have thought it "all but a certainty that the rule of *Simmons* was not only *not* compelled, but *forbidden*;" and its remarkable conclusion that *Simmons* constitutes "the *paradigmatic* 'new rule.'" 95 F.3d at 1222, 1231-32, 1218 (emphasis added). (App. 12a, 31a, 3a.)

It would be more accurate to say that *Simmons* furnishes a "paradigmatic" example of what is *not* a new rule.

A decision constitutes a "new rule" within the meaning of *Teague* if it "breaks new ground or imposes a new obligation on the States." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989). By contrast, a rule is deemed not "new" if a reasonable jurist in considering the petitioner's claim at the time the conviction became final would have felt "*compelled* by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (emphasis added).

Here, four reasonable jurists who were Members of this Court—the authors of the plurality opinion in *Simmons*—

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[3] (...continued)
as *Espinosa*, and the Fourth Circuit below was even more narrowly divided than the Eleventh Circuit was in the decision at issue in *Lambrix*.

expressly stated that the *Simmons* decision was "compel[led]" by existing precedent. *Simmons*, 114 S. Ct. at 2194. Three concurring Justices, while not actually using the verb "compel," indicated in substance their agreement with the plurality. *Id.* at 2200-01. Thus, if this Court meant what it said in *Saffle* v. *Parks*, *Simmons* presents a straightforward example of a decision that did *not* announce a "new rule."

The decisions that the *Simmons* Court found "compel[led]" its result were *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). *Gardner* concerned a defendant who was sentenced to death based in part on a pre-sentence report that was not made available to him, and therefore could not be rebutted. This Court ruled that the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362. *Skipper* applied this principle to a specific situation strikingly similar to the situation presented here and in *Simmons*. In *Skipper*, this Court held that a defendant was denied due process by the refusal of a trial court to admit evidence of the defendant's good behavior in prison during the penalty phase of his capital trial. The Court explained that "[w]here the prosecution relies on a prediction of future dangerousness in asking for the death penalty," fundamental due process principles require the admission of the defendant's relevant evidence in rebuttal. *Skipper*, 476 U.S. at 5 n.1.

In essence, *Simmons* presented a variation on the facts in *Skipper*. Skipper was denied the right to prove that he had behaved well in prison, and thereby suggest to the jury that he would not be dangerous if sentenced to life imprisonment. Simmons sought to present to the jury the even more obviously relevant fact that he would *be* in prison, and not out on the street, for the rest of his life if given a life sentence.

It is small wonder that the *Simmons* Court found that *Gardner* and *Skipper* "compel[led]" the upholding of Simmons' claim under the Due Process Clause. As the dissenters below noted:

> The similarity between the situation that confronted Skipper and Simmons is especially striking. Surely a Constitution that entitles a defendant to rebut the prosecution's argument of future dangerousness with evidence of his good behavior in prison likewise entitles him to inform the jury that he will remain incarcerated for life. *Cf.* [*Skipper*, 476 U.S.] at 5 n.1. Thus, it would have been an illogical application of *Skipper* "to [have] decide[d] that it did not extend to the facts of" *Simmons*.

95 F.3d at 1258 (quoting *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990)). (App. 88a.) Even the majority below conceded that:

> Were *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

95 F.3d at 1225. (App. 17a.)

Where the majority below departed radically from established *Teague* jurisprudence was in its strenuous attempt to construct a theory on which a "reasonable jurist" *might* have found that the result in *Simmons* was not compelled by *Gardner* and *Skipper*. For this conclusion, the majority relied principally on *California* v. *Ramos*, 463 U.S. 992 (1983), in which this Court upheld as consistent with due process a California sentencing provision that permitted the trial court to advise the jury of the Governor's power to commute a life

sentence, but did not require it to inform the jury of the Governor's power to commute a death sentence.

On its face, *Ramos* is obviously distinguishable from *Simmons*: the possibility that the Governor will commute a sentence of death is simply not comparable, in its potential impact on a sentencing jury, to a statutory guarantee that the defendant will never be paroled. It is easy to imagine a jury that will vote for a death sentence because it thinks parole is a possibility; it is rather difficult to imagine a jury that will vote for a death sentence only because it is unaware of the Governor's commutation power. Because the information withheld from the jury in *Ramos* was so much less relevant than the information withheld in *Simmons*, *Ramos* furnishes no basis for upholding the practice that *Simmons* rejected.[9]

Moreover, the *Ramos* decision expressly recognized that a state's general discretion to determine what a jury may be told about sentencing is *limited* by *Gardner*'s due process right of rebuttal. *Ramos*, 463 U.S. at 1004. Indeed, *Ramos*—which was decided prior to *Skipper*—carefully noted that "the California statute in question *permits* the defendant to present any evidence to show that a penalty less than death is appropriate in his case." *Id.* at 1005 n.19 (emphasis added).

Nevertheless, the majority below devoted six pages of its opinion to an intense—we think it fair to say, a tortured—analysis of *Ramos* and *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985) (holding that, under the Eighth Amendment, it was

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[9] In fact, in the last two years, only two death sentences have been imposed in Virginia for crimes committed after January 1, 1995--down from ten death sentences in 1994 alone--a decline that experts attribute directly to the fact that juries must now be informed of Virginia's life-without-parole rule. *See* Frank Green, *Death Sentences Decline in Virginia*, Richmond Times-Dispatch, Nov. 24, 1996. (App. II 279a.)

impermissible for a prosecutor to tell the jury that it would not be finally responsible for the death penalty because its decision was subject to appellate review). 95 F.3d at 1225-31. (App. 17a-31a.) The majority concluded that a reasonable jurist "would have been obliged to reconcile" what it perceived as a tension between *Gardner* and *Skipper*, on the one hand, and *Ramos* and *Caldwell*, on the other hand. 95 F.3d at 1232. (App. 31a.) According to the majority, a reasonable jurist would have found this "reconciliation" in a "fact/law" distinction:

> That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with relevant factual evidence about himself, his character, and his particular offense. . . .
>
> In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos* . . . as setting forth the principle that whether to instruct juries on state law . . . is a decision left to the "wisdom of the states" by the Constitution. . . .

95 F.3d at 1232-33. (App. 32a-34a.)

So far as we are aware, the members of the majority are the first "reasonable jurists" anywhere to perceive this supposed tension between *Gardner* and *Skipper*, on the one hand, and *Ramos* and *Caldwell*, on the other hand—let alone attempt to "reconcile" them on the basis of a "fact/law" distinction. The majority cited a number of cases decided prior to *Simmons* that cited *Ramos* for the proposition that a defendant was not entitled to present information about parole eligibility to a jury, but these cases turned on different facts and contained little, if any, analysis—and no analysis remotely

resembling that of the majority. *See, e.g., Peterson* v. *Murray*, 904 F.2d 882, 886-87 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990); *Knox* v. *Collins*, 928 F.2d 657, 660 (5th Cir. 1991) (both cited at 95 F.3d at 1237. (App. 42a.)).

Indeed, there is no pre-*Simmons* decision that attempts a reasoned justification of the practice that *Simmons* condemned—the practice of forcing a jury to decide the issue of future dangerousness in ignorance of the fact that the defendant is facing life without parole. The unfairness of such a procedure is obvious. There never was a time when any "reasonable jurist" would have thought it fair to condemn a man to death in such a manner.

Thus, it is small wonder that the "fact/law" distinction on which the majority below relied finds no support in precedent. Nor was it ever suggested by the Commonwealth below. It is a completely artificial and, as applied to this case, meaningless distinction. What O'Dell wanted the jury to know here was essential factual information—that, in truth, if given a life sentence, he would spend the rest of his life in prison. The relationship of this fact to the Virginia parole statute does not justify concealing it from the jury. The reason suggested by the majority below—that the state of the law can "change with time," while facts cannot, 95 F.3d at 1234 (App. 35a)—is wholly unconvincing. Good behavior, for example—the "fact" at issue in *Skipper*—is at least as likely as the life-without-parole statute at issue here and in *Simmons* to "change with time." The "fact/law" distinction makes no sense in the context of this issue.

In sum, the majority in the court of appeals went to enormous lengths to avoid the obvious conclusion—that *Simmons* was a "compel[led]" consequence of *Gardner* and *Skipper*—and to construct an artificial theory on which *Simmons* might have been thought to be a "new rule." This

approach—which invites courts to elevate practically any decision of significance to the status of a "new rule"—is wholly inconsistent with this Court's well-established *Teague* jurisprudence. *See, e.g., Stringer* v. *Black*, 503 U.S. 222, 237 (1992) ("The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents" based on an "objective" standard.); *Wright* v. *West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful and any deviation from precedent is not reasonable.").[7]

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* FALLS WITHIN THE SECOND EXCEPTION TO *TEAGUE*

Even if a decision announces a "new rule," it should nevertheless be applied retroactively if it falls within the second exception to *Teague*, that is, if it constitutes one of the "bedrock" procedural protections without which "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311-13. Even on the assumption that *Simmons* announced a new rule, a substantial issue is pre-

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[7] Indeed, it is instructive to compare the majority's opinion below to the *dissents* from decisions of this Court holding that particular rules were not "new" under *Teague*. *See Stringer*, 503 U.S. at 238 (Souter, J., dissenting); *Penry* v. *Lynaugh*, 492 U.S. 302, 350 (1989) (Scalia, J., dissenting in part). In both cases, we respectfully submit, the dissenters had a far better basis for arguing that the rules in question were "new" than did the majority below. Yet, in both *Stringer* and *Penry*, a majority of this Court held that no "new rule" had been announced.

sented as to whether this "bedrock" exception to *Teague* applies.

The six dissenters below did not need to reach this question in light of their conclusion that the applicable rule in *Simmons* was not a "new rule." 95 F.3d at 1261 n.11. (App. 95a.) Nevertheless, the dissenters observed that:

> a strong argument could be made that when a state undertakes to impose a death sentence solely on the ground that a capital defendant poses a further danger, "fundamental fairness and the accuracy of the criminal proceeding" demand that he not be precluded from showing that he was, by virtue of the law of that state, parole ineligible.

Id. (quoting *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990)).

The majority cursorily dismissed this argument, stating only that "[w]e do not believe that the rule announced in *Simmons* is on par with the rule announced in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)." 95 F.3d at 1239. (App. 46a.)

The majority was wrong in taking the issue so lightly. As the *Simmons* concurrence observed, it is a "hallmark[] of due process" that a defendant be entitled to "meet the State's case against him." *Simmons*, 114 S. Ct. at 2200 (O'Connor, J., concurring). *Simmons* was based on this Court's view that, where a prosecutor has raised the issue of future dangerousness, if the defendant is not permitted to rebut by presenting accurate information about his parole ineligibility, it is significantly less likely that the sentencing jury will decide the dangerousness issue accurately. In other words, *Simmons* is a decision that protects a capital defendant against

a misinformed and mistaken decision that could cost him his life.

Seen in this light, the applicable rule of *Simmons is* "on par" with *Gideon* in the relevant way: both decisions rest upon this Court's belief that certain procedural protections are essential to prevent miscarriages of justice. *Compare*, *e.g.*, *Williams* v. *Dixon*, 961 F.2d 448, 454-56 (4th Cir.) (rule forbidding unanimity requirement for jury's finding of mitigating circumstances falls within the second *Teague* exception), *cert. denied*, 506 U.S. 991 (1992); *Nutter* v. *White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (rule invalidating faulty reasonable-doubt instruction falls within exception).

As five judges of the Eleventh Circuit explained in concluding that the rule of *Gardner* falls within the second exception to *Teague*:

> *Teague* provides for retroactive application of "accuracy-enhancing procedural rules" which implicate the "bedrock procedural elements" of a criminal conviction. . . . The principle enunciated in *Gardner* is clearly such a rule. This rule is meant to provide for better fact-finding through adversarial procedure. *Gardner* allows crucial information to be clarified and supplemented. The result is that the sentencer has an improved and more accurate view of the facts upon which the sentence should be based.

Moore v. *Zant*, 885 F.2d 1497, 1525 (11th Cir. 1989) (Johnson, J., dissenting), *cert. denied*, 497 U.S. 1010 (1990); *see also id.* at 1521 (Kravitch, J., dissenting) (*Gardner* is "based on the right of confrontation, and our adversarial system—unlike the inquisitorial method—depends above all

else upon the right of confrontation to arrive at an accurate result.").[1]

The question of whether the holding of *Simmons* falls within the second exception to *Teague* is an issue worthy of consideration by this Court.

III.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DNA EVIDENCE IS A SUFFICIENT SHOWING OF ACTUAL INNOCENCE UNDER *SCHLUP*

To provide a basis for understanding the *Schlup* "actual innocence" issue here, it is necessary to review the evidence in some detail. It is also necessary to point out that the court of appeals' description of the evidence is riddled with factual errors and misleading characterizations. Some of these are corrected below, and others are listed in Volume II of the Appendix.

A. Apart From the Blood Evidence, the Evidence Against O'Dell Was Insubstantial

1. The Events of February 5-7, 1985

Helen Schartner's body was found in a field behind the After-Midnight Club in Virginia Beach, Virginia on February 6, 1985. (J.A. 17, 2252) Schartner had been at the County Line, a Western-style bar and dance hall, with a

[1] In *Moore*, there was no majority opinion of the *en banc* court; the plurality disposed of the case on different grounds and did not address whether the rule of *Gardner* falls within the second exception to *Teague*.

number of friends the prior evening. She was seen leaving the County Line between 11:15 and 11:25 p.m. (J.A. 1194, 1221) O'Dell was also at the County Line on February 5. However, there is no indication that O'Dell knew Schartner, danced with her that night, spoke with her or left with her. Undisputed testimony at trial showed that O'Dell left the County Line alone at midnight, considerably later than Schartner. (J.A. 2003-04) O'Dell's clothes became bloody that night, but no witness connected the blood to the Schartner murder. O'Dell's explanation—that he was in a fight at a place called the Brass Rail on the night of the murder—was corroborated by independent evidence. Two employees at the bar testified that the fight had taken place, and one identified O'Dell as the man who had intervened and been bloodied in the effort. (App. II 252a-257a.) Two Norfolk police officers responded to a call reporting a fight at the same time and location. (App. II 259a-261a.)

There were no eyewitnesses to the crime. No evidence linked O'Dell to it except forensic evidence and a purported confession O'Dell supposedly made to a fellow prisoner, Steven Watson.

2. The Forensic Evidence

Jacqueline Emrich, a neophyte forensic technician (J.A. 1701), analyzed the blood on the soiled clothing found at the home of O'Dell's lover, and blood on certain items retrieved from O'Dell's car. DNA testing did not then exist, and the dried blood was compared to O'Dell's and Schartner's blood using the controversial method known as multisystem electrophoresis. (J.A. 326, 1849-54) Emrich ignored standard scientific methods in failing to replicate the test. (J.A. 2124-33) She also failed to record numerous important variables, such as the nature of the solutions and gels she used and the voltage at which the test was performed. (J.A. 2099-2100)

Nor was any blind testing performed by another technician to verify the accuracy of Emrich's results. (J.A. 1929-30, 2095) Despite these errors in methodology, and the incomplete, inconsistent and inconclusive results that were obtained, Emrich was permitted to opine at trial that the bloodstains found on O'Dell's clothes and in his car were "consistent" with the blood of the victim. (J.A. 1927)

Aside from this blood evidence, the other forensic evidence failed to link O'Dell to the murder; indeed, some of the forensic evidence was strongly exculpatory. Thus, although the Commonwealth maintained that Schartner had been raped, and the rape was essential to make the killing a capital murder, seminal fluid found in her vagina and anus did not match the enzymes found in O'Dell's seminal fluid. (J.A. 1888-90) A vaginal swab enzyme test showed that sperm found in the victim's vagina and anal cavity had a PGM 2-1 marker (J.A. 1889, 1891), while O'Dell's marker is PGM-1. (J.A. 1888) No satisfactory explanation was given for this discrepancy. Emrich speculated that vaginal fluid—containing PGM 2-1—when commingled with the sperm, changed the sperm's marker to PGM 2-1 (J.A. 1937), but that does not explain how a PGM 2-1 marker was found in the anal cavity, since there it is no vaginal fluid in that portion of the body.[9]

Other forensic evidence simply proved nothing.

No fingerprints of O'Dell were found in the victim's car (J.A. 1568-69), and no fingerprints of the victim were found in O'Dell's car. None of O'Dell's fingerprints were

[9] Contrary to the court of appeals' decision, 95 F.3d at 1251 (App. 74a), the Commonwealth's trial expert testified that the source of the sperm could have had any of three different types of PGM markings. (J.A. 1960)

found at the scene where the body was discovered (J.A. 1238-49), and the Commonwealth's forensic expert was unable to testify that tire tracks found at the scene were from O'Dell's car. (J.A. 1266, 2294) A Marlboro softpack cigarette was found near the body, but it was undisputed that O'Dell smoked Winstons. (J.A. 1523-26, 2294-95) Moreover, O'Dell's boots did not match footprints found at the scene. (J.A. 1015-20) Indeed, the trial judge remarked that, "It's obvious from everybody's information and the evidence before the Court that the footprint that was found was not your footprint. Whose it was, who knows." (J.A. 2294)

The crime scene was wet and muddy, but no mud, botanical debris or other matter from the murder scene was found in O'Dell's car, even though the Commonwealth claimed that he wrestled on the ground with the victim during the murder. (J.A. 1385-86) Nor was there any evidence that the soil on O'Dell's clothing or shoes matched soil in the field, even though the prosecution told the jury that O'Dell had held the victim's head down with his knees. (J.A. 2253)

Furthermore, Emrich's test revealed no blood, semen, hairs or other biological indicia of O'Dell on the victim's clothes. (J.A. 1932) Contrary to the court of appeals' decision below, 95 F.3d at 1219, 1251 (App. 5a), the large majority of hairs found in O'Dell's car were neither O'Dell's nor Schartner's, and the three hairs purportedly found to be "consistent" with Schartner's could have belonged to "a lot of women" other than Schartner. (J.A. 1912-17, 1925)

3. Steven Watson

Steven Watson testified that, while he and O'Dell were incarcerated in the medical block at the Virginia Beach City Jail, O'Dell confessed to him that he committed the Schartner murder. (J.A. 1672-75) (By contrast, Connie Craig, a

prosecution witness who was O'Dell's lover at the time of the crime, did not claim that he ever admitted guilt to her.) Watson's criminal record (J.A. 1670-71), and his penchant for making deals with the authorities (J.A. 80, 1681, 1696, 1753-56), combined with the blatantly false nature of the story, rendered his testimony worthless. (Indeed, after the court of appeals' decision below, Watson recanted and executed a detailed and persuasive affidavit admitting that he had lied in his trial testimony. *See* n.14, *infra.*)

Watson's version of the murder contradicted the prosecution's theory. Watson testified that O'Dell purchased Schartner drinks and they left together (J.A. 1674), whereas every other witness who was present at the County Line on the night in question testified that O'Dell and Schartner were not together in the bar. (*See, e.g.*, J.A. 2004) In fact, the eyewitness testimony was that O'Dell left by himself, substantially later than Schartner. (*See, e.g.*, J.A. 2003) Whereas the prosecution's witnesses testified that Schartner had been repeatedly bludgeoned with a blunt object (J.A. 1401-05, 2906), Watson made no mention of these blows. He testified that O'Dell "put his hand around her throat and strangled her." (J.A. 1674)

Watson faced life imprisonment on several felony charges. From jail, he called and wrote to the Commonwealth's attorney "informing" him of O'Dell's "confession" and asking for "help." (J.A. 240-41, 1684-87) Felony charges against Watson and his wife were later dropped, and he received probation instead of a life sentence. (J.A. 240-41, 1689) Watson himself admitted after trial that he engaged in bargaining with authorities prior to the dropping of his West Virginia charges. (J.A. 240-41) Additionally, John Wayne Reid, a West Virginia State Trooper, testified that Watson "has a reputation of being untruthful" (J.A. 2044), and that Watson told him about a "deal" in the O'Dell case.

(J.A. 2050) Steven Jory, Watson's attorney at the time, recounted that one of the conditions of Watson's plea was that Watson, a West Virginia resident, return to Virginia Beach, Virginia—the site of O'Dell's trial—to serve his probation. (J.A. 242) This condition was requested by the local prosecutor's office. (*Id.*) Following O'Dell's trial, Watson was permitted to return to West Virginia. (J.A. 78)

At trial, O'Dell attempted, but was not allowed, to demonstrate through the testimony of Larry Talkington, a co-defendant of Watson in a West Virginia matter, that Watson was a frequent informant who would go to great lengths to avoid jail. (J.A. 2038, 2056-57) Additionally, O'Dell attempted to proffer three letters that Watson had written to judges in Virginia Beach concerning deal-making. (J.A. 1753-56) In one letter, Watson wrote: "Let's make a deal Judge Whitehurst. I want out of jail any kind of way I can get out. Let's make a deal." (J.A. 1753) The proffer of this evidence was denied and the jury never heard it. (J.A. 1761-64)

B. Subsequently-Obtained DNA Evidence Contradicted the Blood Evidence Used at Trial

1. State Habeas Proceedings

O'Dell brought habeas corpus proceedings in the Virginia state courts. Most of his claims were dismissed without an evidentiary hearing, but a limited hearing was permitted on two issues, one of which was the reliability of Emrich's forensic analysis. (J.A. 207) At that hearing, O'Dell presented the results of a DNA analysis prepared by LifeCodes, Inc. on the same areas of clothing tested by the Commonwealth's trial expert. (J.A. 2570-633, 2717-58) With respect to the DNA evidence, O'Dell's and the Commonwealth's expert witnesses agreed: all of them

concluded that the DNA evidence showed an *exclusion* between the blood on O'Dell's shirt and the victim's blood (J.A. 2600-2601, 2633, 2750), and that the DNA testing comparing the blood on O'Dell's jacket to the victim's blood produced an inconclusive result. (J.A. 2602, 2750)[10/]

Following the hearing, the court dismissed the state habeas petition. (J.A. 2776-80) On the DNA issue, the court found that O'Dell had received a fair trial under the state of scientific knowledge in 1985, but acknowledged that "current testing methods would have produced a different result." (J.A. 2779) Virginia courts do not recognize actual innocence either as a basis for relief or as a gateway to reaching defaulted claims.

On petition for certiorari from the denial of state habeas relief, three Members of this Court expressed the view that, in light of DNA blood testing performed after O'Dell's trial, "there are serious questions as to whether O'Dell committed the crime." *O'Dell* v. *Thompson*, 502 U.S. 995, 998 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor). (App. 180a.)

2. Federal Habeas Proceedings

After exhausting state remedies, O'Dell began the present federal habeas corpus proceeding. The district court ordered an evidentiary hearing to determine whether O'Dell could show actual innocence such that his otherwise procedurally barred claims could be considered on the merits

[10/] The majority opinion below gives the misleading impression that the Commonwealth's experts endorsed LifeCodes' conclusion that the blood on O'Dell's jacket was Helen Schartner's. 95 F.3d at 1253. (App. 77a.) In fact, no expert who testified for either side gave this opinion.

under *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), or his execution would be unconstitutional under *Herrera* v. *Collins*, 506 U.S. 390 (1993). (J.A. 243, 298) However, the district court limited the one-day hearing only to testimony from experts on DNA. (App. II 251a)[11/]

After hearing experts from both sides, the district court made factual findings that the blood on the shirt was *not* Helen Schartner's and that her blood could not be matched with the blood on the jacket. (App. 68a.) The district court further held that the newly discovered DNA evidence demonstrated O'Dell's factual innocence under the "fair probability standard" set forth in *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986). Nevertheless, the district court held that O'Dell had failed to satisfy the more demanding "clear and convincing" standard required by *Sawyer*. (App. 129a.)

While the case was on appeal, this Court issued its decision in *Schlup* v. *Delo*, 115 S. Ct. 851 (1995), which held that a habeas petitioner claiming "actual innocence" as a ground justifying review of what would otherwise be procedurally barred claims need only show that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 867. Here, the court of appeals held that the DNA evidence undermining the prior, less accurate blood tests on which O'Dell was convicted did not meet the *Schlup* standard. The court of appeals also refused to order a full evidentiary hearing on the innocence issue.

[11/] Contrary to the court of appeals' opinion, the district court, despite O'Dell's request, did not conduct a "full evidentiary hearing" on actual innocence. 95 F.3d at 1250. (App. 71a.)

C. The DNA Evidence Satisfies *Schlup*

The court of appeals' narrow and grudging application of *Schlup* is a departure from precedent that warrants this Court's review. Indeed, three Members of this Court previously expressed the view that, in light of the DNA blood testing performed after O'Dell's trial, "there are serious questions as to whether O'Dell committed the crime." *O'Dell* v. *Thompson*, 502 U.S. 995, 998 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor).

After holding a one-day evidentiary hearing restricted to DNA evidence, without giving O'Dell a chance to present other evidence relevant to his innocence, the district court specifically found that O'Dell met the *Kuhlmann* standard, which requires a petitioner to show "a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt." *Kuhlmann*, 477 U.S. at 454 n.17. While this case was on appeal, however, this Court issued its decision in *Schlup*, in which it adopted the standard of *Murray* v. *Carrier*, 477 U.S. 478 (1986), for claims of "actual innocence," requiring that the petitioner show that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867. As the court of appeals below acknowledged, this standard is "similar" to and "has been treated as functionally the same" as the *Kuhlmann* standard that the district court found O'Dell met. 95 F.3d at 1249 (quoting *Schlup*, 115 S. Ct. at 863-65). (App. 69a.)

However, rather than remanding the case to allow the district court to consider O'Dell's actual innocence claim in light of the new standard, the court of appeals proceeded to apply it itself. 95 F.3d at 1250-54. (App. 72a-79a.) In doing so, the court of appeals took great liberties with the facts, selectively substituting its conclusions for those of the district

court, while rejecting or ignoring contrary findings by the district court that were amply supported by the record.

O'Dell's conviction stands or falls on the original forensic blood evidence. There is no other evidence of real weight. O'Dell demonstrated below that, in light of more accurate DNA testing that shows no connection between O'Dell and the crime, the blood evidence introduced at trial misled the jury.

As the district court expressly found, DNA testing shows that the only meaningful blood evidence is *exculpatory*: the blood on the shirt "could not have come from Schartner" (App. 102a), and no determination about the blood on the jacket can be made. (App. 68a, 128a.)

The court of appeals dismissed these findings as "not particularly helpful." 95 F.3d at 1248. (App. 68a.)[12] It conceded that "the LifeCodes report, the Commonwealth's experts, and O'Dell's expert all agree[d] that one of the stains on his shirt was from neither O'Dell nor Schartner." 95 F.3d at 1253. (App. 77a.) However, it maintained that "*the LifeCodes DNA report conclusively stat[ed] that the blood on O'Dell's jacket was Helen Schartner's*," and that a reasonable juror might find this a sufficient basis to convict. *Id.* (italics in original). In doing so, however, the court of appeals improperly disregarded the district court's express finding that O'Dell's expert was more persuasive on the inferences that could properly be drawn from the data upon which LifeCodes relied—an expert that the court of appeals itself acknowledged

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[12] Despite this observation, in declining to remand for the district court to apply the new standard, the court of appeals inconsistently declared that the district court had "made adequate factual findings." 95 F.3d at 1250. (App. 71a.)

was "at least credible." *Id.*[13] In short, the court of appeals impermissibly construed the DNA evidence in a way that the district court expressly *found* to be unpersuasive, thereby usurping the exclusive province of the factfinder.

The rest of the evidence upon which the court of appeals relied could not possibly persuade a reasonable juror of O'Dell's guilt. The forensic evidence, apart from the blood evidence, is described above; to the extent it proves anything, it is exculpatory.

Absent the blood evidence, the Commonwealth's case depended wholly on the testimony of Steven Watson, the "jailhouse snitch" whose testimony is summarized above. It is plain, we submit, that no reasonable jury could convict O'Dell based on Watson's testimony, and the court of appeals erred in relying on it.[14]

Although O'Dell's habeas petition requested an evidentiary hearing on all of his claims (J.A. 175), the district court limited O'Dell's hearing to but a single issue—the DNA

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[13] LifeCodes declared a match only after using a monomorphic probe to "correct" for band shifting. LifeCodes' controversial method of "correcting" test results that otherwise do not match has been rejected by other laboratories, the scientific community, *see* National Research Council, *DNA Technology in Forensic Science* 61 (1992), and the courts, *see People* v. *Keene*, 591 N.Y.S.2d 733, 740 (N.Y. Sup. Ct. 1992); *State* v. *Quatrevingt*, 670 So. 2d 197, 205-06 (La.), *cert. denied*, 117 S. Ct. 294 (1996).

[14] Indeed, after the court of appeals below issued its decision, Watson formally *recanted* his testimony at O'Dell's trial, stating that he had made up O'Dell's "confession" to obtain release from the West Virginia charges and in response to improper prosecutorial pressure. *See* Joe Jackson, *Witness Recants Testimony that Death-Row Inmate Confessed in Jail*, The Virginian-Pilot, Oct. 23, 1996. (App. II 246a.)

evidence. (J.A. 243) Although the DNA evidence by itself is sufficient to permit review of procedurally barred claims, the court of appeals erred in not remanding for a full hearing on the "circumstantial evidence" and Watson's testimony. Had O'Dell been given such a hearing, he could have still more clearly demonstrated his actual innocence.

The district court's limitation of the evidentiary hearing to DNA evidence prevented O'Dell from presenting, for example, expert evidence as to the significance of the enzyme markers in the seminal fluid found in the victim's body -- evidence demonstrating that O'Dell could not have raped Schartner. O'Dell was also prevented from presenting witnesses who could have contradicted Watson's patently incredible—and subsequently recanted—denials that he arranged a plea agreement in exchange for his testimony. (J.A. 1675, 1689) O'Dell is entitled to an unfettered hearing on his claim of actual innocence. *See Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992) (requiring that an evidentiary hearing be held if a fundamental miscarriage of justice would otherwise occur).

O'Dell was wrongly convicted of committing this crime. The court of appeals departed from precedent in holding that the DNA evidence did not establish O'Dell's actual innocence under *Schlup* and did not justify a remand for a full evidentiary hearing on actual innocence. Certiorari should be granted to correct this important error.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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Respectfully submitted,

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